

THE HONORABLE TANA LIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DANIELLE LATIMER,
for Herself, as a Private Attorney
General, and/or On Behalf Of All
Others Similarly Situated,

Plaintiff,

v.

AT&T MOBILITY LLC,
DIRECTV, LLC,
JOHN DOE 1, and
DOES 2–20, inclusive,

Defendants.

No. 2:21-cv-00856-TL

**PLAINTIFF’S SUR-REPLY
IN OPPOSITION TO DEFENDANTS’
MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER
JURISDICTION**

PLAINTIFF’S SUR-REPLY

Plaintiff Danielle Latimer requests that this Court sever and remand her second claim, which seeks only injunctive relief under the Washington Commercial Electronic Mail Act (“CEMA”). Plaintiff makes her request for two reasons: the Court *can* sever and remand her CEMA claim, and the Court *should* in order to avoid imposing costs and prejudice on Plaintiff and on the state court.

The Court Possesses The Authority To Sever And Remand A Claim Over Which It Lacks Jurisdiction. To the degree that the Ninth Circuit has addressed the topic, the law places no restrictions on a trial court’s ability to sever and remand individual claims over which it lacks jurisdiction. If anything, the Ninth Circuit is holding the door wide open to ultimately recognize the procedure: “A case that is properly removed in its entirety may nonetheless be effectively split up when it is subsequently determined that some claims cannot be adjudicated in federal court.” *Lee v. American National Ins. Co.*, 260 F.3d 997, 1007 (9th Cir. 2001). The *Lee* court did not definitively rule on the subject only because the appellant insisted that his case be remanded in its entirety, an argument the Ninth Circuit rejected. *Ibid.*

District courts squarely confronted with the issue have severed and remanded claims. In *Buscema v. Wal-Mart Stores East LP*, 485 F. Supp. 3d 1319, 1324 (D.N.M. 2020), the plaintiff filed in state court and alleged a first claim for individual money damages and a second claim for classwide injunctive relief—similar to this case. After removal under both traditional diversity jurisdiction (as to the individual monetary claim) and the Class Action Fairness Act (as to the classwide injunctive claim), the plaintiff sought remand, and the court retained jurisdiction over the first claim for individual monetary relief but severed and remanded the second claim for classwide injunctive relief. *Buscema*, 485 F. Supp. 3d at 1331. “[T]he Court agrees with Plaintiff that her class action claim for injunctive relief must be remanded to the Second Judicial District for lack of Article III standing. ... While the Court recognizes that such a partial remand is unusual, it finds that a partial remand is the most appropriate remedy in this situation under the caselaw.” *Ibid.* The court cited *Lee*—indicating that *Lee* is read to allow severance and remand—and *Shaw v. Marriott Intern., Inc.*, 605 F.3d 1039 (D.C. Cir. 2010),

1 which Plaintiff cited in her Opposition (p. 24).¹

2 Similarly, in *Tarpon Transportation Services, Inc. v. Total Quality Logistics, LLC*, 2021
3 WL 3111641, *1 (M.D. Fla. July 22, 2021), the plaintiff filed a complaint in state court, and the
4 defendant removed under traditional diversity jurisdiction and moved to dismiss. The Court
5 found that it lacked jurisdiction over Count I and severed and remanded the count. “[T]he Court
6 lacks jurisdiction over Count I. Total is incorrect, however, in arguing for dismissal of this
7 claim. Because this case was removed from state court, the proper remedy is remand.... [¶]
8 Additionally, Tarpon’s lack of standing for Count I does not require remand of the entire
9 case—the Court need only remand the claims over which it lacks jurisdiction.” *Id.* at *3.

10 While Defendants AT&T Mobility LLC and DirecTV, LLC (collectively, “AT&T”) will no doubt nitpick details of these decisions (and the ones cited in Plaintiff’s Opposition), the
11 bottom line is that federal district courts have in the past severed and remanded individual
12 claims because they have the authority to do so. The decisions in *Buscema, Climer* (fn. 1,
13 *supra*), *Northern Trust Corp.* (fn. 1, *supra*) and *Tarpon Transportation Services* (as well as in
14 *Langford v. Gates*, 610 F. Supp. 120, 122 (C.D. Cal. 1985), and *Machlan v. Procter & Gamble*,
15 77 F. Supp. 3d 954 (N.D. Cal. 2015), which were cited in the Opposition) are all concrete
16 examples of this authority being exercised in the real world. These precedents should be more
17 persuasive to this Court than AT&T’s ethereal concerns about the structure or alternative
18 readings of the removal statutes. If the Court still deems this a close question, the tiebreaker is
19 Fed.R.Civ.P. 21, which states in relevant part, “The court may also sever *any claim* against a
20 party.” (Emphasis added.) While Rule 21 may ordinarily be used to sever parties (Reply, p. 9),
21 it expressly allows this Court to sever claims.
22

23 **Dismissing Count II Would Be Unfair And Prejudicial To Plaintiff, The Class, And**

24
25 ¹ *Buscema* also cites (at p. 1330) *California v. Northern Trust Corp.*, 2013 WL 1561460, *5
26 (C.D. Cal. April 10, 2013) (in which the district court cited *Lee*, stated that “[t]he remand
27 statute, 28 U.S.C. § 1447(c), does not, on its face, foreclose the possibility of partial remand
28 where diversity jurisdiction exists as to all claims but a plaintiff lacks standing as to some
claims,” and remanded the first and third causes of action) and *Climer v. Twin City Fire Ins.*
Co., 2004 WL 1531796, *6 (N.D. Tex. July 8, 2004) (severing and remanding Texas Labor
Code claim that had been removed under diversity jurisdiction).

1 **The Snohomish County Superior Court.** The obvious prejudice of a dismissal is that it places
 2 Plaintiff **and the Class** in jeopardy of a statute of limitations defense upon re-filing. “In some
 3 cases, a plaintiff might forfeit an otherwise viable state-law claim because that claim was part
 4 of a removed diversity case which was subsequently determined to be beyond the federal
 5 court’s power to decide, a result which might militate in favor of remanding, rather than
 6 dismissing, nonjusticiable state-law claims.” *Lee*, 260 F.3d at 1006–07. *See Carnegie-Mellon*
 7 *University v. Cohill*, 484 U.S. 343, 352 (1988) (“potent reason” to remand). **In fact, if this**
 8 **Court dismisses (and does not remand) the injunctive relief cause of action (Claim II),**
 9 **then numerous Class members may forever lose their injunctive relief claims in state**
 10 **court concerning emails sent prior to March 2018.** (As the Complaint alleges at ¶ 40, “Based
 11 on information and belief, the defendants started to transmit such emails, conspire to transmit
 12 such emails, and/or assist in the transmitting of such emails in 2016.”)

13 Other prejudice also inures from a dismissal. In *Carnegie-Mellon University*, 484 U.S.
 14 at 353, the U.S. Supreme Court explained in the context of pendant jurisdiction the reasons why
 15 remand was the less prejudicial option: “Even when the applicable statute of limitations has not
 16 expired, a remand may best promote the values of economy, convenience, fairness and comity.
 17 Both litigants and States have an interest in the prompt and efficient resolution of controversies
 18 based on state law. Any time a district court dismisses, rather than remands, a removed case
 19 involving pendent claims, the parties will have to refile their papers in state court, at some
 20 expense of time and money. **Moreover, the state court will have to reprocess the case, and**
 21 **this procedure will involve similar costs.** Dismissal of the claim therefore will increase both
 22 the expense and the time involved in enforcing state law.” (Emphasis added.)

23 If this Court were to dismiss Claim II without prejudice, Plaintiff would be forced to
 24 incur the attorneys’ fees involved in redrafting the Complaint, would have to pay again the
 25 \$240 in Superior Court filing fees she previously paid and would have to pay to re-serve the
 26 two AT&T defendants with **a class action complaint for injunctive relief only.** The
 27 Snohomish County Superior Court would likewise expend resources originating a new action.
 28 None of these costs would be incurred if this Court remanded Count II—the fairer option.

1 DATED this 22nd day of March, 2022.

2 HATTIS & LUKACS

3 By: /s/ Paul Karl Lukacs

4 Paul Karl Lukacs, WSBA No. 56093

5 pkl@hattislaw.com

6 Daniel M. Hattis, WSBA No. 50428

7 dan@hattislaw.com

8 Che Corrington, WSBA No. 54241

9 che@hattislaw.com

10 HATTIS & LUKACS

11 400 108th Avenue NE, Suite 500

12 Bellevue, WA 98004

13 Phone 425.233.8650

14 Fax 425.412.7171

15 *Attorneys for Plaintiff Danielle Latimer*
16 *and the Proposed Class*
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington and the United States of America that on the 22nd day of March, 2022, the document attached hereto was filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record in the matter.

DATED this 22nd day of March, 2022.

/s/ Che Corrington
Che Corrington, WSBA No. 54241